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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92052172
Party	Plaintiff Vital Pharmaceuticals, Inc.
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Date	10/24/2011
Attachments	Motion for Leave to File Surreply with Surreply.pdf (10 pages)(45832 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK AND APPEAL BOARD**

In the matter of Registration No: 3733480
For the mark Redline Media Group
Date registered January 5, 2010

VITAL PHARMACEUTICALS, INC.)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92052172
)	
REDLINE MEDIA GROUP, LLC a/k/a)	
REDLINE MEDIA GROUP LIMITED)	
LIABILITY COMPANY)	
)	
Registrant.)	
_____)	

**PETITIONER’S MOTION FOR LEAVE TO FILE SURREPLY
IN SUPPORT OF PETITIONER’S RESPONSE
IN OPPOSITION TO REGISTRANT’S MOTION TO COMPEL OR IN THE
ALTERNATIVE, TO STRIKE WITNESS FROM PETITIONER’S
AMENDED INITIAL FED. R. CIV. P. 26(a)(1) DISCLOSURES**

Petitioner Vital Pharmaceuticals, Inc. (hereinafter “VPX”) respectfully seeks Leave of the Court to file the attached Surreply in order to correct several misstatements and distortions of the factual record and rules of law, made for the first time in Registrant Redline Media Group’s (hereinafter “RMG”) Reply Brief in Support of Motion to Compel or in the Alternative, to Strike Witness from Petitioner’s Amended Initial Fed. R. Civ. P. 26(a)(1) Disclosures (“Reply”) that essentially amount to the assertion of new “facts” and legal argument.

These misstatements include false representations that RMG met and conferred with VPX in good faith to resolve the issue(s) presently before this Court on RMG's prematurely filed motion. The Court should grant VPX's motion in order to allow VPX to address and correct these misrepresentations.

The decision to grant or deny leave to file a surreply is committed to the sound discretion of the court. American Forest & Paper Ass'n, Inc., v. U.S. Environ. Protection Agency, No. 93- cv-0694 (RMU), 1996 WL 509601, *3 (D.D.C. 1996) (granting leave). Granting leave to file a surreply is appropriate when a reply leaves "a party ... 'unable to contest matters presented to the court for the first time.'" Ben-Kotel v. Howard Univ., 319 F.3d 532, 536 (D.C. Cir. 2003) (citation omitted); Alexander v. FBI, 186 F.R.D. 71, 74 (D.D.C. 1998) (granting leave). A surreply may be necessary whether the new matter is factual or raises new legal arguments. It is particularly appropriate in order to address and correct inaccuracies in a reply memorandum. See American Forest & Paper, 1996 WL 506601 at *3. VPX's proposed Surreply (copy appended hereto as Attachment 1) easily satisfies this standard.

Argument

RMG's Reply includes several misstatements, including allegations that RMG met and conferred with VPX's counsel in good faith, in an attempt to resolve the issue that was before the Court via RMG's premature Motion to Compel. In particular, RMG claims that VPX informed RMG that "the information would not be forthcoming" in reference to Ms. Lee's contact information. Reply at p1. This statement is categorically false: VPX never told RMG's counsel that it would not provide Ms. Lee's contact information- an opposite RMG's counsel stated in his "follow-up" e-mail after the meet

and confer in August that VPX agreed to provide Ms. Lee's contact information. (See RMG's Motion, Exhibit "A")

VPX's Surreply is necessary in order to address and correct the errors, misstatements, misrepresentations and falsities presented by RMG in its Reply in support of its motion. See Ben-Kotel, 319 F.3d at 536; Alexander, 186 F.R.D. at 74; American Forest & Paper, 1996 WL 506601 at *3.

Conclusion

For the foregoing reasons, VPX respectfully requests that this Court issue an order granting VPX leave to file its proposed Surreply.

Dated: this 24th day of October, 2011

Respectfully Submitted,

/vg/
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2011 a true and correct copy of the foregoing was electronically filed with the U.S. Patent and Trademark Office using ESTTA, and via regular first class mail to: Allan M. Lerner, Esquire, Law Office of Allan M. Lerner, P.A., 2888 East Oakland Park Boulevard, Fort Lauderdale, FL 33306.

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EXHIBIT “A”

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK AND APPEAL BOARD**

In the matter of Registration No: 3733480
For the mark Redline Media Group
Date registered January 5, 2010

VITAL PHARMACEUTICALS, INC.)	
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REDLINE MEDIA GROUP, LLC a/k/a)	
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**PETITIONER’S SURREPLY IN OPPOSITION TO REGISTRANT’S
MOTION TO COMPEL OR IN THE ALTERNATIVE,
TO STRIKE WITNESS FROM PETITIONER’S
AMENDED INITIAL FED. R. CIV. P. 26(a)(1) DISCLOSURES**

Petitioner Vital Pharmaceuticals, Inc. (hereinafter “VPX”) opposes Registrant Redline Media Group (hereinafter “RMG”) Motion to Compel or in the Alternative, to Strike Witness from Petitioner’s Amended Initial Fed. R. Civ. P. 26(a)(1) Disclosures, and in support files this surreply and states as follows:

In RMG’s own reply brief, RMG admits that counsel for RMG only contacted and spoke to VPX counsel requesting different contact information for witness Diana Lee once, on or about August 25, 2011, and at that time, VPX agreed to provide that information to RMG. Subsequent to that discussion, yet prior to the filing of RMG’s motion to compel and strike witness, RMG and VPX engaged in discussions pertaining

to discovery matters, yet not once did RMG ever attempt to discuss the matter of Diana Lee's personal address with VPX again. Instead, RMG let a month go by, while remaining silent as to the pending submission of Ms. Lee's contact information and then without notice proceeded to file its Motion to Compel or in the alternative to strike. Such actions do not meet the standard of the required good faith meet and confer regarding discovery disputes prior to racing to the Court for intervention. One brief conversation with an agreement by VPX to provide information (when it becomes available) does not make for a good faith effort to meet and confer in an attempt to resolve a dispute that apparently was not a "dispute" after all. As such, RMG has not met the requirements set forth by Rule 37 of the Federal Rules of Civil Procedure to warrant this Court's entertaining of RMG's motion to strike and for other sanctions.¹

MEMORANDUM IN SUPPORT OF VPX'S POSITION

I. **BECAUSE RMG DID NOT MEET AND CONFER IN GOOD FAITH, RMG IS NOT ENTITLED TO HAVE ITS MOTION AND/OR REQUESTS FOR SANCTIONS BE HEARD.**

In order to seek Court intervention under Rule 37 of the Federal Rules of Civil Procedure, the Rule itself spells out that parties must meet and confer in good faith.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) In General.

On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery.

¹ The Motion to Compel portion of RMG's Motion to Compel or in the Alternative, to Strike Witness from Petitioner's Amended Initial Fed. R. Civ. P. 26(a)(1) Disclosures, is now moot as RMG possess the information it sought to compel, yet still continues with the Motion in its entirety, as set forth in RMG's initial pleading.

The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

Fed. R. Civ. P. 37 (a)(1). RMG did not attempt to confer with VPX counsel in good faith on the issue of RMG's allegations that VPX was not in compliance with Rule 26. VPX's counsel was informed of Ms. Lee's potential witness status the night before the deposition of VPX 30(b)(6) witness, John H. Owoc. (See Exhibit "1" to VPX's Opposition, Pagano Decl. ¶4). Within days following the deposition, on August 24, 2011, VPX served supplemental initial disclosures pursuant to Rule 26(a), identifying Diana Lee as a potential witness in the matter. RMG's counsel was unhappy with the fact that VPX did not list a personal address for Ms. Lee, but rather listed VPX's address – something RMG took no issue with when VPX previously listed VPX's address for communications with third party witness Karen Godwin. RMG and VPX's counsel discussed the issue briefly, to which RMG's counsel sent a follow-up e-mail (See RMG's Motion, Exhibit "A"). In the follow-up e-mail, RMG's attorney stated:

[A]s a follow-up to our call this morning, your amended 26a disclosures did not provide for an address or telephone # as required by the federal rules for Diana Lee who you identified as having evidence of actual confusion. You have informed me that you would provide this contact information. You have also objected to me speaking to her outside of your presence. Since you concede you do not represent her, there is no basis for this requirement and it operates as an inappropriate sequestration of a potential witness. If you insist on this position I will take it up with a motion to compel with the USPTO. If she has counsel she can advise me of that fact.

(See RMG's Motion, Exhibit "A") (emphasis added). RMG's counsel admits in his own e-mail communication and motion that VPX agreed to provide RMG with Ms. Lee's

contact information. It appears as a result of the one brief meet and confer on the issue, RMG's counsel's sole concern was the request of VPX's counsel to be present during all communications RMG had with Ms. Lee, and it was that issue and that issue alone that prompted the threat of a motion to compel.

Additionally, not one time in any of the discussions subsequent to this "follow-up" email communication was the issue of Diana Lee's address ever brought up by RMG. In fact, the parties were proceeding forward in accordance with the discovery schedule, propounding written discovery requests and setting depositions including the deposition of Ms. Lee, and RMG never inquired as to when VPX would be able to provide Ms. Lee's contact information, as VPX had agreed to do so from the start.

This motion is nothing more than an attempt to have this Court disqualify a potentially harmful witness to RMG's case by alleging falsities, misrepresentations, and failing to follow the rules of this Court. RMG prematurely filed this motion without properly meeting in good faith to resolve the issue, and thus should not be rewarded for the "burden" RMG placed upon itself.

II. DESPITE RMG'S FALSE ALLEGATIONS, VPX WAS AT ALL TIMES IN COMPLIANCE WITH FEDERAL RULE OF CIVIL PROCEDURE 26.

As set forth in VPX's opposition, Rule 26(a)(1)(A)(i) of the Federal Rules of Civil Procedure states that a party must provide to the other parties "the name and, *if known*, the address and telephone number of each individual likely to have discoverable information . . ." (Fed. R. Civ. P. 26(a)(1)(A)(i), emphasis added). As it had been explained to RMG's counsel, Ms. Lee was in the process of relocating and was not in a position to provide VPX with her permanent address and phone number. Once Ms. Lee

had concluded her move, she provided VPX with her contact information, and VPX in turn promptly provided RMG's counsel with Ms. Lee's information. VPX was not in violation of Fed. R. Civ. P. 26, as the rule clearly prescribes for a party to provide the contact information for an individual if known; VPX did not know Ms. Lee's address or telephone number so it could not provide that information to RMG's counsel.

III. CONCLUSION

Wherefore, VPX respectfully requests that an order be issued (1) denying RMG's Motion to Compel, (2) denying RMG's Motion to Strike, (3) denying RMG's Request for Sanctions, and (4) awarding sanctions against RMG and its counsel for frivolously filing its Motion to Compel and then continuing with the Motion to Compel after RMG received the information it was looking to compel.

Dated: this 24th day of October, 2011

Respectfully Submitted,

/vq/

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